

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

Carl V. Cardi, III et al.,	:	
Plaintiffs-Appellants,	:	
v.	:	No. 12AP-15 (C.C. No. 2011-11483)
State of Ohio, Department of Commerce, Division of Industrial Compliance and Labor, Board of Building Standards,	:	(REGULAR CALENDAR)
Defendant-Appellee.	:	

D E C I S I O N

Rendered on December 27, 2012

DeSanto & McNichols, Debra J. DeSanto and David J. McNichols, for appellants.

Michael DeWine, Attorney General, Christopher P. Conomy and Kristin S. Boggs, for appellee.

APPEAL from the Ohio Court of Claims

KLATT, J.

{¶ 1} Plaintiffs-appellants, Carl V. Cardi, III and CVC Limited 1 LLC ("CVC"), appeal a judgment of the Ohio Court of Claims that dismissed appellants' action against defendant-appellee, the State of Ohio, Department of Commerce, Division of Industrial Compliance and Labor, Board of Building Standards ("state"). For the following reasons, we affirm.

{¶ 2} Cardi and CVC filed suit against the state on September 29, 2011. The complaint alleged that CVC manufactures and installs coolWIRE, a wire support and separator system developed by Cardi. Cardi contacted Penn National Gaming, Inc. ("Penn National") to submit a bid for the installation of coolWIRE in the casinos that

Penn National was building in Toledo and Columbus. According to Cardi, Penn National responded that it did not have to follow the Ohio Building Code. Based on these facts, appellants asserted that the state's failure to enforce the building code on Penn National's projects deprived appellants of potential earnings. Appellants requested that:

[The] Court issue an Order requiring the State of Ohio, Board of Building Standards, by and through their employees, to enforce the laws as set forth herein with regard to the construction of casinos throughout the State of Ohio; that the Court declare that the regulations and rules as set forth in the Ohio Building Code are legal and enforceable, that the Court prohibit any construction of any gaming facility until such time as the plans for said facilities are in compliance with the Ohio Building Code, for damages to Plaintiffs as a result of the Ohio Department of Building Standard's [sic] failure to enforce the regulations as set forth herein and for such other relief, in law or equity as the Court deems proper.

(R. 1.)

{¶ 3} The state moved for dismissal of appellants' complaint under Civ.R. 12(B)(6). Appellants opposed the motion. Within their response, appellants requested that the Court of Claims either deny the state's motion or, in the alternative, permit them to amend their complaint.

{¶ 4} In a December 6, 2011 judgment entry, the Court of Claims granted the state's motion and dismissed the case. The Court of Claims recognized that the complaint stated claims for injunctive and declaratory relief. However, for the Court of Claims to exercise jurisdiction over those claims, the complaint also needed to state a claim for money damages. The Court of Claims found that, "[a]lthough plaintiffs' prayer seeks recovery for loss of potential earnings, the court is unaware of any recognized legal theory under which such relief could be granted based upon the facts as pleaded in the complaint." (R. 13, at 2.) Because appellants had failed to state a claim for money damages, the Court of Claims found that it lacked subject-matter jurisdiction over their action. As a final matter, the Court of Claims stated that, "to the extent that plaintiffs' response to the motion seeks leave to amend the complaint, plaintiffs have neither articulated any specific additional facts that could be pleaded in order to give rise to a claim for monetary damages nor have they provided the court with a proposed amended complaint setting forth such facts, if any." *Id.*

{¶ 5} Appellants now appeal the December 6, 2011 judgment entry, and they assign the following error:

THE COURT OF CLAIMS COMMITTED REVERSIBLE ERROR IN GRANTING DEFENDANT DEPARTMENT OF COMMERCE'S 12(B) MOTION TO DISMISS FOR LACK OF JURISDICTION DUE TO A FAILURE TO STATE A CLAIM FOR MONETARY RELIEF IN ACCORDANCE WITH R.C. 2743.03(A)(2).

{¶ 6} Initially, we note that the state only moved to dismiss under Civ.R. 12(B)(6). The Court of Claims, however, ultimately dismissed appellants' case because it found that it did not possess subject-matter jurisdiction. Lack of subject-matter jurisdiction, set forth in Civ.R. 12(B)(1), and failure to state a claim, set forth in Civ.R. 12(B)(6), are separate and distinct bases for dismissal. Given the disparity between the basis for the state's motion and the basis on which the court dismissed the case, we must determine whether the Court of Claims applied the appropriate lens through which to consider the state's motion.

{¶ 7} In the Court of Claims Act ("Act"), R.C. Chapter 2743, the General Assembly waived the state's immunity from liability, created the Court of Claims, and invested the Court of Claims with exclusive, original jurisdiction over civil actions permitted by the waiver of sovereign immunity. *State ex rel. Sawicki v. Court of Common Pleas of Lucas Cty.*, 121 Ohio St.3d 507, 2009-Ohio-1523, ¶ 28; *Friedman v. Johnson*, 18 Ohio St.3d 85, 86 (1985). The Act, however, does not apply "[t]o the extent that the state ha[d] previously consented to be sued" in the courts of common pleas. R.C. 2743.02(A)(1). Thus, if, prior to the state's waiver of immunity, the law permitted a party to pursue a particular type of action against the state, then the Court of Claims lacks jurisdiction to hear that type of action. *Selective Ins. Co. v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 11AP-597, 2012-Ohio-1314, ¶ 20; *Interim Healthcare of Columbus, Inc. v. Ohio Dept. of Adm. Servs.*, 10th Dist. No. 07AP-747, 2008-Ohio-2286, ¶ 12. As a result, the Court of Claims has no jurisdiction over actions that only seek declaratory judgment or injunctive relief, because, before the advent of the Act, parties could sue the state for declaratory and injunctive relief in the courts of common pleas. *Racing Guild of Ohio, Local 304, Serv. Emps. Internatl. Union*, 28 Ohio St.3d 317, 320 (1986); *Interim Healthcare of Columbus, Inc.* at ¶ 12. Nevertheless, when a claim for declaratory judgment, injunctive relief, or

other equitable relief is ancillary to a claim over which the Court of Claims has jurisdiction, the Court of Claims possesses jurisdiction to adjudicate the entire action. R.C. 2743.03(A)(2); *Ohio Hosp. Assn. v. Ohio Dept. of Human Servs.*, 62 Ohio St.3d 97, 103 (1991). The Court of Claims has exclusive jurisdiction over civil actions against the state for money damages that sound in law. *Measles v. Indus. Comm.*, 128 Ohio St.3d 458, 2011-Ohio-1523, ¶ 7; *Columbus Green Bldg. Forum v. State*, 10th Dist. No. 12AP-66, 2012-Ohio-4244, ¶ 16. Thus, if a plaintiff asserts a legal claim for money damages in addition to a claim for declaratory and/or injunctive relief and all the asserted claims arise out of the same circumstances, then the Court of Claims can exercise jurisdiction over the action. *Columbus Green Bldg. Forum* at ¶ 16; *Interim Healthcare of Columbus, Inc.* at ¶ 13.

{¶ 8} Here, appellants stated claims for declaratory and injunctive relief. The Court of Claims' jurisdiction over those claims depended on whether the complaint also set forth a claim for money damages. If the complaint failed to state such a claim, then the Court of Claims lacked jurisdiction to hear the claims for declaratory and injunctive relief. This scenario implicates both Civ.R. 12(B)(6) and 12(B)(1). *Modern Office Methods, Inc. v. Ohio State Univ.*, 10th Dist. No. 11AP-1012, 2012-Ohio-3587, ¶ 11-12. The state, thus, erred in only relying on Civ.R. 12(B)(6) as authority for its motion. However, the state's error did not limit the Court of Claims to a Civ.R. 12(B)(6) review. Because a court is powerless to hear a case without subject-matter jurisdiction, a court may raise the issue of subject-matter jurisdiction sua sponte and may dismiss a case if it finds that it lacks subject-matter jurisdiction over it. *Foreman v. Lucas Cty. Court of Common Pleas*, 189 Ohio App.3d 678, 2010-Ohio-4731, ¶ 12, 18 (10th Dist.); *Adams v. Cox*, 10th Dist. No. 09AP-684, 2010-Ohio-415, ¶ 19; Civ.R. 12(H)(3) ("Whenever it appears by suggestion of the parties or otherwise that the court lacks jurisdiction on the subject matter, the court shall dismiss the action."). We conclude that the Court of Claims appropriately applied a combined Civ.R. 12(B)(1) and 12(B)(6) analysis to the state's motion. We will do the same. See *Modern Office Methods, Inc.* at ¶ 12.

{¶ 9} In order for a court to dismiss a complaint under Civ.R. 12(B)(6), it must appear beyond a doubt from the complaint that the plaintiff can prove no set of facts entitling him or her to recovery. *Volbers-Klarich v. Middletown Mgt., Inc.*, 125 Ohio

St.3d 494, 2010-Ohio-2057, ¶ 12. A similar standard applies to Civ.R. 12(B)(1) motions: the court must dismiss if the complaint fails to allege any cause of action cognizable in the forum. *Blankenship v. Cincinnati Milacron Chems., Inc.*, 69 Ohio St.2d 608, 611 (1982). An appellate court reviews rulings on both types of motions under a de novo standard of review. *Perrysburg Twp. v. Rossford*, 103 Ohio St.3d 79, 2004-Ohio-4362, ¶ 5 (reviewing a Civ.R. 12(B)(6) motion under a de novo standard); *Modern Office Methods, Inc.* at ¶ 8 (holding that an appellate court reviews a Civ.R. 12(B)(1) motion de novo).

{¶ 10} Appellants did not identify any legal theory of recovery in their complaint or in their response to the state's motion to dismiss. Now, however, appellants argue that they have alleged sufficient facts to support a claim for promissory estoppel. To support this argument, appellants rely on cases such as *Mecon, Inc. v. Univ. of Akron*, 126 Ohio St.3d 231, 2010-Ohio-3297, syllabus, where the Supreme Court of Ohio held:

When a rejected bidder establishes that a public authority violated state competitive-bidding laws in awarding a public-improvement contract, that bidder may recover reasonable bid-preparation costs as damages if that bidder promptly sought, but was denied, injunctive relief and it is later determined that the bidder was wrongfully rejected and injunctive relief is no longer available.

{¶ 11} Monetary recovery in "disappointed bidder" cases is permitted under the theory of promissory estoppel. *Mechanical Contrs. Assn. of Cincinnati, Inc. v. Univ. of Cincinnati*, 152 Ohio App.3d 466, 2003-Ohio-1837, ¶ 23 (10th Dist.) To succeed on a claim for promissory estoppel, a party must establish: (1) a clear and unambiguous promise, (2) reliance by the party to whom the promise was made, (3) the reliance was reasonable and foreseeable, and (4) the party relying on the promise was injured by the reliance. *Reif v. Wagenbrenner*, 10th Dist. No. 10AP-948, 2011-Ohio-3597, ¶ 42. In "disappointed bidder" cases, when the state solicits bids, it represents that it will comply with the statutory competitive bid procedures in R.C. Chapter 153. In reasonable reliance on this representation, a bidder incurs costs preparing and submitting a bid. Thus, if the state reneges on its representation, an unsuccessful bidder may recover its bid-preparation costs under certain circumstances.

{¶ 12} This case does not fit with the "disappointed bidder" cases. The project involved here is not a public-improvement project, but a private project. The state,

therefore, did not solicit any bids. Absent the state's solicitation of bids, appellants cannot show and, in fact, did not plead, that the state made any representation to them. Consequently, the complaint fails to state a claim for promissory estoppel.

{¶ 13} Moreover, we conclude that, given the allegations in the complaint, appellants cannot state any claim for money damages against the state. While the state waived its sovereign immunity in R.C. 2743.02, the state also limited its amenability to suit. R.C. 2743.02(A)(1) provides that the state may "be sued * * * in accordance with the same rules of law applicable to suits between private parties." By including this limitation, the Act placed the state on the same level as any private party; it did not create a new right of action against the state. *McCord v. Ohio Div. of Parks and Recreation*, 54 Ohio St.2d 72, 74 (1978). Thus, a plaintiff may not pursue an action against the state if he or she could not pursue the same action against a private party. *Bell v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. No. 10AP-920, 2011-Ohio-6559, ¶ 22; *Henneke v. Ohio Dept. of Ins.*, 10th Dist. No. 11AP-254, 2011-Ohio-5366, ¶ 8. In other words:

[S]uits against the state are inherently limited by the type of action asserted against it; if the cause of action is not cognizable as between private parties, then there can likewise be no state liability. For instance, actions * * * that do *not* sound in tort but seek recovery purely for a statutory violation will not necessarily lie against the state—particularly if the statute in question provides no private right of action.

(Emphasis sic.) *Wallace v. Ohio Dept. of Commerce*, 96 Ohio St.3d 266, 2002-Ohio-4210, ¶ 37.

{¶ 14} Here, appellants admittedly seek money damages for the state's alleged failure to enforce the Ohio Building Code. Appellants could not likewise sue a private party. Consequently, appellants cannot plead a viable cause of action for money damages against the state.

{¶ 15} In their final argument, appellants contend that the Court of Claims erred in denying their request to amend their complaint. This argument does not correlate with appellants' sole assignment of error, which only challenges the Court of Claims' ruling on the state's motion to dismiss. Pursuant to App.R. 12(A)(1)(b), appellate courts must "[d]etermine [an] appeal on its merits on the assignments of error set forth in the briefs under App.R. 16." Thus, generally, appellate courts will rule only on assignments of error,

not mere arguments. *Thompson v. Thompson*, 196 Ohio App.3d 764, 2011-Ohio-6286, ¶ 65 (10th Dist.). Because appellants failed to assign as error the Court of Claims' ruling on their request to amend, we decline to review that ruling.

{¶ 16} For the foregoing reasons, we overrule appellants' assignment of error, and we affirm the judgment of the Ohio Court of Claims.

Judgment affirmed.

FRENCH and DORRIAN, JJ., concur.
